Supreme Court, U.S.
FILED

No. 99-524

In The

Supreme Court of the United States

MILOS J. JIRICKO, M.D.,

Petitioner,

vs.

MOSER AND MARSALEK, P.C.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Did the United States Court of Appeals properly affirm the judgment of the district court dismissing Petitioner's claim against the defendant employer, which was based on a respondeat superior theory of liability for the acts of its employees, because Petitioner's prior suit against the individual employees for the same acts resulted in a judgment in favor of the employees, and the doctrine of res judicata prevents relitigation of Petitioner's claims.

CORPORATE LISTING

Moser and Marsalek, P.C., is a Missouri professional corporation. Moser and Marsalek, P.C., has no parent or subsidiary companies.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE LISTING ii

TABLE OF AUTHORITIES iv

STATEMENT OF CASE 1

REASONS FOR DENYING THE WRIT 6

I. The United States Court of Appeals for the Eighth Circuit Correctly Affirmed the Judgment of the District Court Dismissing Petitioner's Claims Against Defendant Moser and Marsalek, P.C., Based on the Actions of Moser and Marsalek, P.C.'s Employees Because Petitioner Was Barred From Re-litigating These Claims Under the Doctrine of Res Judicata in that a Prior Case Brought By Petitioner Against the Employees Resulted in a Final Judgment on the Merits in Favor of the Employees and Against Petitioner 6

A. The Dismissal of Petitioner's Claims in *Jiricko IV* Adhered to All Procedural Requirements and Satisfied Petitioner's Right to Due Process 7

B. The District Court and United States Court of Appeals for the Eighth Circuit Properly Applied the Doctrine of Res Judicata in Finding that Petitioner was Barred from Relitigating His Claim 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Conley v. Gibson, 355 U.S. 41 (1957) 8, 9

Costner v. URS Consultants, Inc., 153 F.3d 667 (8th Cir. 1998) 9

Jaramillo v. Berkhart, 59 F.3d 78 (8th Cir. 1995) 11

Jones v. Gann, 703 F.2d 513 (11th Cir. 1983) 8

Lane v. Peterson, 899 F.2d 737 (8th Cir. 1990), cert. denied, 498 U.S. 823 (1990) 10

Migra v. Warren City School Dist. Board of Education, 465 U.S. 75 (1984) 9

Montana v. United States, 440 U.S. 147 (1979) 9

Neitzi v. Williams, 490 U.S. 319 (1989) 9

Nome v. Des. Arc Convalescent Home, 872 F.2d 823 (8th Cir. 1989) 10

Oldham v. Pritchett, 599 F.2d 274 (8th Cir. 1979) 10

State ex rel. City of Fenton v. Hamilton, 941 S.W.2d 785 (Mo. App. W.D. 1997) 11

Tyus v. Schoemehl, 93 F.3d 449 (8th Cir. 1996) 10

United States v. Gurley, 43 F.3d 1188 (8th Cir. 1994) 10

Williams v. Murdoch, 330 F.2d 745 (3rd Cir. 1964) 8

STATUTES, RULES & REGULATIONS

S. Ct. R. 10 6

S. Ct. R. 13 7

Rule 12(b)(6), Federal Rules of Civil Procedure 8

Restatement (2nd) Judgments, § 27 (1982) 10

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Moser and Marsalek, P.C., respectfully suggests that the Court deny the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Eighth Circuit. The Opinion is unpublished. *Jiricko v. Moser and Marsalek, P.C.*, 187 F.3d 641, 1999 WL 427336 (8th Cir. June 24, 1999).

STATEMENT OF CASE

The present case is related to several court proceedings instituted by the Petitioner in the courts of the Seventh and Eighth Circuits. The first lawsuit was entitled *Jiricko v. Illinois Anesthesia Ltd.*, and was filed in the United States District Court for the Southern District of Illinois, No. 91-CV-00092 WDS (*"Jiricko I"*). This lawsuit involved an employment dispute between the Petitioner and his former employer, Illinois Anesthesia. Petitioner was represented by members of the Lakin & Herndon, P.C., law firm during the initial stages of *Jiricko I*. During the case, the Lakin & Herndon, P.C., law firm and its members obtained leave of Court to withdraw from their representation of Petitioner. Petitioner then refused to obtain new counsel and six months later, his claim against his employer was dismissed for want of prosecution. The United States Court of Appeals for the Seventh Circuit affirmed that dismissal in *Jiricko v. Illinois Anesthesia Ltd.*, Nos. 92-2613, 92-2682 (Seventh Circuit, August 27, 1993) unpublished Order 1993 WL 326697 (referenced in "Table of Decisions Without Reported Opinions" at 4

F.3d 996). In its Order, the Seventh Circuit imposed sanctions against Petitioner for filing frivolous motions.

The second lawsuit was filed on June 10, 1993, by Petitioner pro se against his former attorneys, the Lakin & Herndon, P.C., law firm and members of that firm, in the United States District Court for the Southern District of Illinois, 93-CV-398-WDS styled *Jiricko v. Lakin & Herndon, P.C.*, et al. (*"Jiricko II"*). In *Jiricko II*, Petitioner attempted to state a claim for legal malpractice, fraud and conversion against his former attorneys for their alleged failure to pursue the original conversion claim against his former employer, Illinois Anesthesia Ltd. Attorneys Brian R. Plegge and Patrick J. Horgan entered their appearance on behalf of defendants Lakin & Herndon, P.C., and members of that law firm in *Jiricko II*. On behalf of their clients, Mr. Plegge and Mr. Horgan filed a motion for summary judgment and supporting memorandum of law. The motion for summary judgment was granted by the Honorable William D. Stiehl on September 19, 1994, in a memorandum opinion.

Petitioner then filed a second appeal with the Seventh Circuit Court of Appeals arising out of Judge Stiehl's granting of the summary judgment motion filed by Mr. Plegge and Mr. Horgan in *Jiricko II*. On November 15, 1995, the Seventh Circuit entered an unpublished order affirming the summary judgment of Judge Stiehl in *Jiricko II*. *Jiricko v. Lakin & Herndon, P.C.*, No. 94-3344, 1195 WL 623825 (7th Cir. Nov. 15, 1995) (referenced in a "Table of Decisions Without Reported Opinions" at 69 F.3d 539). The Seventh Circuit stated that in the underlying legal malpractice claim, Petitioner had caused the District

Court to "spend scarce resources on hearing one irrelevant motion after another and was held to make repetitious explanations about pretrial procedures, conversion and malpractice." (*Id.* at 3). The Seventh Circuit, on its own motion, gave Petitioner fourteen days within which to show cause why it should not impose sanctions for filing a frivolous appeal. (*Id.* at 2). Petitioner did not respond to the show cause order. Thereafter, on January 11, 1996, the Seventh Circuit issued an order sanctioning Petitioner for the second time. In its Order, the Seventh Circuit prevented Petitioner from filing any papers in any federal court in the Seventh Circuit, excluding criminal and habeas corpus proceedings "unless petitioner first filed a motion for leave to file attaching certain specified documents, including a sworn affidavit certifying that the matters raised in the proposed filing are not frivolous and have not been raised by him in prior suits." *Jiricko v. Lakin & Herndon, P.C.*, No. 93-398 (7th Cir. Jan. 11, 1996) slip order at 1-2.

In response to the Seventh Circuit's Opinion and Order in *Jiricko II*, Petitioner filed a Petition for Writ of Certiorari styled *Milos J. Jiricko v. Lakin & Herndon, et al.*, Docket No. 95-1394, Application No. A-641. This Court denied Petitioner's Petition for Writ of Certiorari. *Jiricko v. Lakin & Herndon, P.C.*, 517 U.S. 1137 (1996).

On August 29, 1997, Petitioner filed another complaint, this time in the United States District Court for the Eastern District of Missouri styled *Jiricko v. Plegge*, Cause No. 4:97CV01787 ERW naming Brian Plegge, Patrick Horgan, and Judge Stiehl as Defendants ("*Jiricko III*"). In *Jiricko III*, Petitioner alleged that Brian Plegge and Patrick Horgan (the attorneys who represented the Defendants in

Jiricko II) and Judge Stiehl conspired to deprive Petitioner of his constitutional rights, wrongfully deprived him of his right to due process and his right to a jury trial, and denied him the equal protection of the laws. Petitioner based those claims on the following two facts: (1) Plegge and Horgan filed the summary judgment motion in *Jiricko II*; and (2) Judge Stiehl granted the motion. All of the Defendants in that case moved to dismiss Petitioner's complaint. On April 18, 1998, after briefing and a hearing, the Honorable E. Richard Webber granted the Defendants' motions to dismiss and dismissed Petitioner's complaint with prejudice in his memorandum and order. Petitioner appealed the dismissal of this complaint to the United States Court of Appeals for the Eighth Circuit. The United States Court of Appeals for the Eighth Circuit affirmed Judge Webber's Memorandum and Order dismissing Petitioner's complaint in an unpublished per curiam decision. *Jiricko v. Plegge, et al.*, No. 98-2096, 1998 WL 761897 (8th Cir. Nov. 3, 1998). Petitioner did not seek a writ of certiorari in *Jiricko III*.

On November 12, 1998, Petitioner filed another lawsuit in the United States District Court for the Eastern District of Missouri against Moser and Marsalek, P.C., Case No. 4:98CV01893 CDP (*"Jiricko IV"*). In this lawsuit, the Petitioner contended that Defendant Moser and Marsalek, P.C., was liable because its agents, Brian Plegge and Patrick Horgan, deprived Petitioner of his constitutional rights by filing the motion for summary judgment in *Jiricko II*, the underlying legal malpractice case. However, as set forth above, the propriety of the summary judgment was previously litigated in *Jiricko II* in the District Court for the Southern District of Illinois and on appeal

in the Seventh Circuit. In addition, Petitioner's allegations that he was denied his constitutional rights by virtue of the motion for summary judgment were previously litigated in *Jiricko III* by the United States District Court for the Eastern District of Missouri and affirmed by the Eighth Circuit. On December 3, 1998, the Defendant, Moser and Marsalek, P.C., filed a motion to dismiss. On March 2, 1999, after briefing by both parties, Judge Perry of the United States District Court for the Eastern District of Missouri sustained the motion to dismiss. Furthermore, Judge Perry ordered Petitioner to show cause, no later than March 26, 1999, why the filing of this lawsuit was not frivolous and why appropriate sanctions should not be imposed. Thereafter, on April 6, 1999, the district court entered a judgment dismissing Petitioner's claim with prejudice and imposed sanctions against Petitioner by permanently enjoining Petitioner from filing any papers in the Eastern District of Missouri, excluding criminal and habeas corpus proceedings, unless he first files a "motion pursuant to court order seeking leave to file." Petitioner then appealed the judgment of Judge Perry to the United States Court of Appeals for the Eighth Circuit. On June 24, 1999, the United States Court of Appeals for the Eighth Circuit affirmed the trial court's dismissal of Petitioner's claims against Moser and Marsalek, P.C. *Jiricko v. Moser and Marsalek, P.C.*, 187 F.3d 641, 1999 WL 427336 (8th Cir. June 24, 1999).

Petitioner has once again filed a Petition for Writ of Certiorari with this Court based on his claim that he was denied his constitutional rights based on the successful

motion for summary judgment that was filed in *Jiricko II*, the underlying legal malpractice claim.

REASONS FOR DENYING THE WRIT

I. The United States Court of Appeals for the Eighth Circuit Correctly Affirmed the Judgment of the District Court Dismissing Petitioner's Claims Against Defendant Moser and Marsalek, P.C., Based on the Actions of Moser and Marsalek, P.C.'s Employees Because Petitioner Was Barred From Re-litigating These Claims Under the Doctrine of Res Judicata in that a Prior Case Brought By Petitioner Against the Employees Resulted in a Final Judgment on the Merits in Favor of the Employees and Against Petitioner.

The sole issue in this case concerns the district court's dismissal of *Jiricko IV*, because it failed to state a claim for which relief can be granted based on the application of res judicata and the Eighth Circuit's affirmation of the district court's judgment. This issue is simply not one for which this Court should exercise its discretion.

United States Supreme Court Rule 10 states that "[a] petition for a writ of certiorari will be granted only for compelling reasons. One of such reasons, although not controlling, is that "a United States court of appeals . . . has so far departed from the usual and accepted course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. . . . " S. Ct. R. 10(a). However, Rule 10 also states that "[a] petition for a writ of certiorari is rarely granted when the asserted error

consists of . . . the misapplication of a properly stated rule of law." This case contains no issues falling within the purview of Rule 10 and therefore Petitioner's Petition for Writ of Certiorari should be denied.

Initially, it must be noted that in his Petition for Writ of Certiorari, Petitioner raises issues with regard to the propriety of the dismissal of *Jiricko III* (*Jiricko v. Plegge*, No. 4:97CV01787 ERW) and *Jiricko IV* (*Jiricko v. Moser and Marsalek, P.C.*, No. 4:98CV1893 CDP). The dismissal of *Jiricko III* was affirmed by the Eighth Circuit in an unpublished order. *Jiricko v. Plegge*, No. 98-2096, 1998 WL 761897 (8th Cir. Nov. 3, 1998). Petitioner did not file a timely Petition for Writ of Certiorari with respect to the dismissal and subsequent affirmation of the dismissal of *Jiricko III*. Accordingly, the issues raised regarding the propriety of the orders entered in *Jiricko III* are not properly before this Court. Supreme Court Rule 13.

The issues raised with respect to *Jiricko IV* do not fall within the purview of Supreme Court Rule 10. The dismissal of *Jiricko IV* by the district court and the affirmation of the dismissal by the Eighth Circuit Court of Appeals properly adhered to the law in finding that Petitioner failed to state a claim upon which relief may be granted in *Jiricko IV*.

A. The Dismissal of Petitioner's Claims in *Jiricko IV* Adhered to All Procedural Requirements and Satisfied Petitioner's Right to Due Process.

Petitioner argues in his Petition for Writ of Certiorari that his constitutional right to due process was violated because Respondent filed a motion to dismiss and not a

"pleading." (*See* Petition, pp. 7-11). Rule 12 of the Federal Rules of Civil Procedure expressly permits a party to present in a motion the defense of failure to state a claim upon which relief can be granted. Federal Rules of Civil Procedure 12(b)(6). Moreover, the defense of res judicata may be raised by a motion to dismiss under Rule 12(b)(6). *See Williams v. Murdoch*, 330 F.2d 745 (3rd Cir. 1964), and *Jones v. Gann*, 703 F.2d 513 (11th Cir. 1983).

In addition to the adherence to the procedural rules and substantive law, it is clear from the record below that Petitioner was afforded due process. Respondent's motion to dismiss and memorandum in support were filed on December 3, 1998. The motion included as exhibits all pertinent pleadings, orders and decisions from Petitioner's prior litigation. Petitioner was granted until January 25, 1999, to file a response to the motion. Petitioner filed his brief in response to the motion to dismiss on January 22, 1999. Thereafter, Respondent filed a reply and Petitioner was permitted to file an additional brief. On March 1, 1999, the district court granted the motion. The Petitioner appealed to the United States Court of Appeals for the Eighth Circuit. After Petitioner filed his brief, the Eighth Circuit affirmed the judgment of the district court.

The purpose of a motion to dismiss under Rule 12(b)(6), Federal Rules of Civil Procedure, is to test the legal sufficiency of the complaint. The motion shall not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim entitling him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The issue is not whether the plaintiff will ultimately

prevail, but whether the plaintiff is entitled to present evidence in support of his claim. *Id. See also Neitzi v. Williams*, 490 U.S. 319, 327 (1989). In the present case, the doctrine of res judicata barred Petitioner from presenting further evidence and re-litigating his claims.

The Respondent filed a detailed motion to dismiss delineating why the Petitioner's claims were barred. The motion was accompanied by the pleadings, orders and opinions from the prior cases that demonstrated that the Petitioner's current claims were previously litigated and decided against him. Based on the record before the district court and appellate court, it was clear that the prior judgments and decisions barred Petitioner from re-litigating the claims raised in his current lawsuit.

B. The District Court and United States Court of Appeals for the Eighth Circuit Properly Applied the Doctrine of Res Judicata in Finding that Petitioner was Barred from Re-litigating His Claim.

It is well-settled that where a party has already once litigated an issue and has lost, he may not thereafter re-litigate the same issue in another court. Under the doctrine of res judicata, "a final judgment on the merits bars further claims by parties or their privities based on the same cause of action." *Montana v. United States*, 440 U.S. 147, 153 (1979); *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 673 (8th Cir. 1998). The doctrine of res judicata consists of two preclusion concepts: issue preclusion and claim preclusion. *Migra v. Warren City School Dist. Board of Education*, 465 U.S. 75, 77 n. 1 (1984). Under claim preclusion, a final judgment on the merits bars further claims

by the parties or their privities based on the same cause of action. *United States v. Gurley*, 43 F.3d 1188, 1195 (8th Cir. 1994). Under issue preclusion, or as it is sometimes called, collateral estoppel, "once a court has decided an issue of fact or law necessary to its judgment, 'the determination is conclusive in a subsequent action between the parties whether on the same or different claim.' " *Tyus v. Schoemehl*, 93 F.3d 449, 453 (8th Cir. 1996), (quoting Restatement (2nd) Judgments, § 27 (1982)). Issue preclusion will also bar re-litigation of an issue by one who, although not a party to the original suit, is in privity with the party to that suit. *See Oldham v. Pritchett*, 599 F.2d 274, 276 n. 1 (8th Cir. 1979). Whether a party in the later suit may be said to be in privity with a party in the earlier suit, for res judicata purposes, depends on whether their interests are "adequately congruent." *Nome v. Des. Arc Convalescent Home*, 872 F.2d 823, 827 (8th Cir. 1989).

As the Eighth Circuit Court of Appeals and the district court found, the requirements for res judicata have been met in this case. Although couched in somewhat different terms, the claims that Petitioner raised in *Jiricko IV* are essentially the same as those raised in *Jiricko III*. That is, they all relate to the alleged wrongdoing by the lawyers in the filing of a summary judgment motion on behalf of the defendants in *Jiricko II*. *See United States v. Gurley*, 43 F.3d 1188, 1195 (8th Cir. 1994) ("whether the present action is the 'same cause of action' as the prior action depends on whether it 'arises out of the same nucleus of operative facts as the prior claims.' ") (quoting *Lane v. Peterson*, 899 F.2d 737, 742 (8th Cir. 1990), *cert. denied*, 498 U.S. 823 (1990). There is no question that the court in *Jiricko III* had jurisdiction and that its order of

dismissal "operate[d] as a rejection of . . . plaintiff's claims on the merits." *Jaramillo v. Berkhart*, 59 F.3d 78, 79 (8th Cir. 1995). Finally, although Respondent Moser and Marsalek, P.C., the defendant in this case, was not named as a defendant in *Jiricko III*, its employees, Brian Plegge and Patrick Horgan, were named as defendants. It is well-settled that where the claim against the employer is premised on respondeat superior, the plaintiff cannot recover against the employer if the employee has been found immune and therefore the plaintiff does not have grounds against the employer. *State ex rel. City of Fenton v. Hamilton*, 941 S.W.2d 785, 789 (Mo. App. W.D. 1997). As the court explained: "The employee's exoneration from liability necessarily exonerates the employer." *Id.* Furthermore, the interest of Messrs. Plegge and Horgan and Moser and Marsalek, P.C., may be deemed "congruent."

The district court and Eighth Circuit Court of Appeals correctly applied the law of res judicata in determining that Petitioner's claims in *Jiricko IV* are barred by the doctrine of res judicata and properly dismissed his claim. Petitioner was afforded his right to due process.

CONCLUSION

The Petition for Writ of Certiorari should be denied because the issues raised by Petitioner have previously been resolved by this Court and uniformly by the United States Courts of Appeal. The United States Court of Appeals for the Eighth Circuit correctly followed the precedents of this Court and other courts and there is no

reason why the Petition merits further review. The Petition presents no important question of federal law nor any conflicts among or between the circuit courts of appeal and state courts of last resort. For the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

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